

No. 11973

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

E. C. SIMMONS,

Appellant,

vs.

HARRY C. WESTOVER, Collector of Internal Revenue,

Appellee.

Appeal From the District Court of the United States
for the Southern District of California,

BRIEF FOR THE APPELLEE.

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BRIEF FOR THE APPELLEE.

Opinion Below.

The opinion of the District Court [R. 41-67] is reported at 76 Fed. Supp. 442.

Jurisdiction.

This appeal involves federal income taxes for the year 1925. The taxes in dispute, in the amount of \$1,255.18, plus assessed interest of \$1,904.09, a total of \$3,159.27, were paid on November 14, 1945. [R. 72.] A claim for refund was filed on December 11, 1945. [R. 3-4, 10.] No decision thereon was rendered within six months, and on June 27, 1946, the taxpayer brought this action in the District Court for recovery of the taxes. [R. 6, 72.] Jurisdiction was conferred on the District Court by Section 24, Twentieth, of the Judicial Code. The judgment was entered in favor of the Collector on April 26, 1948. [R. 74-75.] Within sixty days thereafter and on June 21, 1948, a notice of appeal was filed [R. 75], pursuant to the provisions of 28 U. S. C., Section 1291.

Question Presented.

Whether the balance of an assessment of additional income tax for the year 1925, in the amount of \$1,255.18, plus assessed interest of \$1,904.09 (a total of \$3,159.27), paid on November 14, 1945, was paid after the expiration of the period of limitation applicable thereto, and hence was an overpayment within the meaning of Section 3770 (a)(2) of the Internal Revenue Code, as contended by the taxpayer; or was paid within the period of limitation as extended by an unlimited collection waiver, which remained in full force and effect at the time of the payment, as determined by the Commissioner.

Statutes Involved.

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 278 (as amended by Sec. 506(a), Revenue Act of 1928, c. 852, 45 Stat. 791). * * *

(d) Where the assessment of any income, excess-profits or war-profits taxes imposed by this title or by prior Act of Congress has been made (whether before, or after the enactment of this Act) within the period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in Court (begun before or after the enactment of this Act), but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer before the expiration of such six-year period. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

* * * *

Internal Revenue Code:

CHAPTER 1—INCOME TAX

SEC. 1. APPLICATION OF CHAPTER.

The provisions of this chapter shall apply only to taxable years beginning after December 31, 1938. Income, war-profits, and excess-profits taxes for taxable years beginning prior to January 1, 1939, shall not be affected by the provisions of this chapter, but shall remain subject to the applicable provisions of the Revenue Act of 1938 and prior revenue acts, except as such provisions are modified by legislation enacted subsequent to the Revenue Act of 1938. (26 U. S. C. 1946 ed., Sec. 1.)

SEC. 3770. AUTHORITY TO MAKE ABATEMENTS,
CREDITS, AND REFUNDS.

(a) *To Taxpayers.*—

(1) *Assessments and collections generally.*—

* * *

(2) *Assessments and collections after limitation period.*—Any tax (or any interest, penalty, additional amount, or addition to such tax) assessed or paid after the expiration of the period of limitation properly applicable thereto shall be considered an overpayment and shall be credited or refunded to the taxpayer if claim therefor is filed within the period of limitation for filing such claim. (26 U. S. C. 1946 ed. Sec. 3770.)

Statement.

The essential facts, taken from the findings of the court below, are as follows:

On or about October 19, 1929, income taxes for the year 1925 were assessed against the taxpayer. Over-assessments for other years were credited against the amount assessed, leaving a balance of \$3,723.06. After notice and demand, a warrant of distraint was issued with respect to the liability, and on December 19, 1929, notice of lien was filed with the Recorder of Los Angeles County, California. [R. 69.]

The taxpayer made payments from time to time in amounts varying from \$75 to \$250 on the outstanding balance, until August 15, 1933, at which time the balance due was the sum of \$1,255.18, with interest thereon. [R. 69.] On August 1, 1932, the taxpayer executed an "Offer in Compromise" on Treasury Department Form 656, a printed form including a waiver with respect to the statute of limitations, which waiver provided that the taxpayer waived the benefit of any statute of limitations affecting the collection of the liability sought to be compromised and in the event of the rejection of the offer, expressly consented to the extension of any statute of limitations affecting such liability, by the period of time, not exceeding two years elapsed between the date of the filing of the offer and the date on which final action thereon should be taken. The offer and waiver were executed at the request of the Collector of Internal Revenue at Los Angeles, and were filed with such collector

on August 15, 1932. [R. 69.] The taxpayer attached to the foregoing offer his letter dated July 20, 1932, addressed to the Commissioner of Internal Revenue, wherein the taxpayer enclosed a financial statement which showed liabilities in the amount of \$32,482.73, which was in excess of his assets. [R. 70.] Such excess amounted to \$32,283.35½. [R. 25.] The taxpayer stated in the letter that if his financial status became known to his employer he would lose his position. [R. 70.] On August 25, 1932, the Commissioner of Internal Revenue accepted in writing the taxpayer's "Waiver of Statute of Limitations," and on October 18, 1932, rejected the "Offer in Compromise." [R. 70.]

On July 5, 1933, at the request of the Collector of Internal Revenue, the taxpayer executed a "Tax Collection Waiver," wherein it was agreed between the Commissioner of Internal Revenue and the taxpayer that the amount of \$3,472.06, representing as assessment of income taxes for the year 1925, might be collected, with interest, from the taxpayer by distraint or by a proceeding in court begun at any time. At that time, no offer in compromise was pending and the waiver was not submitted in connection with any offer in compromise. The waiver was accepted by the Commissioner on March 5, 1934. [R. 70.]

On May 6, 1936, the taxpayer executed an "Offer in Compromise" on Treasury Department Form 656, a printed form including a waiver with respect to the statute of limitations, which waiver provided that the taxpayer waived the benefit of any statute of limitations

affecting the collection of the liability sought to be compromised, and agreed to the suspension of the statutory period of limitations on assessment or collection for any period during which the offer should be pending and for one year thereafter. The taxpayer tendered with the offer the sum of one hundred dollars in settlement of the balance due, and stated in the offer that he had been without income for several years and had subsisted largely on borrowed money. He included with the offer a financial statement which showed his liabilities in excess of his assets by the amount of \$28,698.35. The offer and waiver were executed at the request of the Collector of Internal Revenue at Los Angeles and were filed with such Collector on May 21, 1936. The Collector transmitted the offer and waiver to the Commissioner of Internal Revenue, forwarding therewith a copy of the Tax Collection Waiver filed July 5, 1933. The waiver executed May 6, 1936 was accepted by the Commissioner of Internal Revenue in writing on May 29, 1936, and the offer submitted at the time of such waiver was rejected by the Commissioner on August 9, 1938. [R. 70-71.]

After August 9, 1938, no offer in compromise from the taxpayer was pending or under consideration by the Bureau of Internal Revenue, and from such date of August 9, 1938, until October 9, 1945, the taxpayer had no correspondence or conferences with the Government concerning the taxes involved, and, to the taxpayer's knowledge, no attempts were made during that period to collect such taxes. [R. 71-72.] On October 9, 1945,

the Collector of Internal Revenue made demand on the taxpayer for the payment of the taxes, and on November 14, 1945, the taxpayer paid the balance of \$1,255.18, plus interest of \$1,904.09, and fifty cents for release of the lien hereinabove mentioned. Thereafter, the taxpayer filed a claim for refund of the amount of the taxes and interest so paid. After the lapse of six months from the filing of the claim without action by the Commissioner, the taxpayer brought the instant action. [R. 72.]

No notice with respect to revoking the Tax Collection waiver of July 5, 1933, was given by the taxpayer. [R. 72.]

Under all the circumstances, no unreasonable time elapsed prior to the date when the Government collected from the taxpayer the taxes herein involved. [R. 72.]

The District Court concluded that the Tax Collection Waiver of July 5, 1933, was valid; that it was not revoked or terminated by the execution and acceptance of the waiver of May 6, 1936; that it was not revoked or terminated by the lapse of time; that it was operative at the time the taxes in question were collected; that the payment of the taxes and interest herein did not constitute an overpayment, and that the defendant Collector was entitled to judgment with costs. [R. 73.]

Summary of Argument.

The taxes in question were collected within the period of limitation as extended by an unlimited waiver which remained in full force and effect at the time of payment.

The collection of the tax was authorized by Section 278 (d) of the Revenue Act of 1926, as amended. The collection was made while an unlimited waiver given by the taxpayer was in full force and effect.

The unlimited waiver was not terminated by an offer in compromise made in 1936, with an accompanying waiver.

The unlimited waiver could not be revoked or terminated by mere lapse of time, but only upon reasonable notice given by the taxpayer, and no such notice was given.

Even if the unlimited waiver was effective only for a reasonable time, the collection of the tax in question, under the circumstances herein, was made within a reasonable time.

There is a presumption that taxes paid are rightly collected upon assessments correctly made by the Commissioner, and in a suit to recover them the burden rests upon the taxpayer to prove all the facts necessary to establish the illegality of the collection. The taxpayer has not sustained that burden in the instant action.

A suit for refund of taxes is governed by equitable principles and the taxpayer must recover by virtue of a right measured by equitable standards.

If the taxpayer was unable to pay the taxes prior to 1945 he has no real ground for complaint as to the delay. If he was able to pay, the delay in payment was as much due to the taxpayer's wrong as to the failure of the tax officials. He should not be permitted to take advantage of his own wrong.

ARGUMENT.

The Taxes in Question Were Collected Within the Period of Limitation as Extended by an Unlimited Waiver Which Remained in Full Force and Effect at the Time of the Payment.

No issue is raised in the taxpayer's complaint [R. 2-4] as to the due and timely assessment of the taxes, and no such issue has been suggested at any time during the presentation of the case. Both parties have assumed that the assessment was timely made, and both have relied upon the statutory provisions pertaining to the collection of taxes after assessment has been made "within the period of limitation properly applicable thereto." Sec. 278(d) of the Revenue Act of 1926, as amended, *supra*. Hence, the discussion herein assumes the timely assessment of the tax.

We agree with the position of the taxpayer (Br. 9) that the tax in question was paid after the period of limitation had expired, unless the Tax Collection Waiver of July 5, 1933, which will be hereinafter referred to as the unlimited waiver, was effective to keep the limitation period open.

A. The Collection of the Tax in Question Was Authorized by Section 278(d) of the Revenue Act of 1926, as Amended.

The period provided for collection in Section 278 (d) of the Revenue Act of 1926, as amended, *supra*, is six years, after assessment, but this period may be extended by agreement. The tax was assessed on or about October 19, 1929, pursuant to an agreement between the taxpayer and the Commissioner. [R. 11-69.] Without extension,

the collection period would therefore have expired on or about October, 1935. While there was some extension of this time by the waiver contained in the 1932 offer in compromise [R. 69, 70], and there was afterward, in 1936, another similar extension, it is the unlimited waiver upon which the Government relies to support the collection. Under this waiver, the collection was made prior to the expiration of the period agreed upon in writing within the meaning of Section 278 (d), as amended, *supra*.

The taxpayer argues (Br. 16) that the unlimited waiver was void *ab initio* because it was not definite in duration. Such a contention was rejected by the Board of Tax Appeals in *Cunningham Sheep & Land Co. v. Commissioner*, 7 B. T. A. 652, 655. The taxpayer asserts (Br. 17) that the *Cunningham* case arose under the Revenue Act of 1921, Section 250(d) of which provides that the taxpayer and the Commissioner may consent to "a later determination" but says nothing about collection within a "period" agreed upon. However, it is to be noted that in that case the Board considered the applicability of Section 278 (c) of the Revenue Act of 1924, which provided that where the Commissioner and the taxpayer had consented in writing to the assessment of the tax after the time prescribed in Section 277, the tax might be assessed at any time "prior to the expiration of the period agreed upon," and said that the consent there involved, which was to a determination, assessment and collection of taxes irrespective of any period of limitations, was sufficient to meet the requirements of such Section 278 (c).

The validity of unlimited waivers was also sustained in *Stange v. United States*, 282 U. S. 270, and *Big Four Oil & Gas Co. v. Heiner*, 57 F. 2d 29 (C. C. A. 3rd).

B. The Unlimited Waiver Was Not Superseded or Terminated by the Limited Waiver Which Accompanied the 1936 Offer in Compromise.

In support of his position that the unlimited waiver was superseded or terminated by the 1936 waiver, the taxpayer cites (Br. 18) *Helvering v. Ethel D. Co.*, 70 F. 2d 761 (App. D. C.). The decision of the court that the unlimited waiver in that case was superseded by the later definite waiver was based on the finding that such was the intention of both the Government and the taxpayer. The circumstances pointing to such intention there are not present in the instant case. The waiver there was requested by the Government apart from and not as incidental to an offer in compromise as was the 1936 waiver in the instant case. The unlimited waiver there was on a form then being abandoned and a new form was being used. The 1936 waiver in the instant case was on a printed form of offer in compromise, and the waiver was incidental to the offer. The new waiver in the *Ethel* case fixed a definite date (December 31, 1925) for the termination of the limitation period, while in the instant case, the 1936 waiver merely suspended the running of the statute for a certain period. The new waiver in the *Ethel* case was requested by the Government and was submitted immediately after the unlimited waiver, and it was definitely understood by both parties that it was asked for and submitted because the unlimited waiver was unsatisfactory. The circumstances are so different that the *Ethel* case can furnish no support for a similar decision in the instant case. In the *Ethel* case, the court said that the new waiver was a sufficient notice to effect a termination of the unlimited waiver as of that date.

In the instant case, the District Court found as a fact that no notice with respect to the termination of the unlimited waiver had been given by the taxpayer. [R. 72.] This implies a finding that the 1936 waiver was not intended as such a termination, and it was clearly not an erroneous finding.

The Taxpayer argues (Br. 22-23) that the 1936 waiver could serve no purpose if the unlimited waiver was operative, but clearly it could serve the purpose of giving the Commissioner a time certain within which to consider the offer submitted, even if the taxpayer at any time gave notice of the termination of the unlimited waiver and regardless of what might be held later as to a reasonable time for the running of the unlimited waiver.

The taxpayer also cites (Br. 19) *Farmers Union State Exchange v. Commissioner*, 30 B. T. A. 1051. The Board there treated the question whether the unlimited waiver was terminated by a later limited waiver as depending on intent, and said (p. 1068) that it must have been intended that the limited waiver should be substituted for the unlimited waiver. The Board noted that the second waiver was executed before the unlimited waiver became effective. In the instant case, the unlimited waiver had been effective from 1933 to 1936, when the limited waiver was executed. In the *Farmers* case like the *Ethel* case, *supra*, the later waiver involved fixed the time of the extension provided for by referring in terms to the expiration of the limitation period. In the *Farmers* case, the later waiver was to be effective for a period of one year after the expiration of the statutory period as previously extended. In the instant case, the limited waiver of 1936 does not in terms provide any date whatever with respect to the expiration of the limitation period. It merely provides for the

suspension of the running of the statutory period for the period during which the offer should be pending and for one year thereafter. [R. 71.]

A provision relative to the suspension of the statute is not equivalent to a provision providing for the expiration of the statute or fixing a date with respect to such expiration. The suspension provision in the limited waiver in the instant case hinged upon the pendency of the offer, and was wholly apart from and independent of any expiration date. *United States v. Markowitz*, 34 F. Supp. 827 (N. D. Cal.); *Olds & Whipple v. United States*, 22 F. Supp. 809 (C. Cls.); *United States v. Bank of Commerce & Trust Co.*, 32 F. Supp. 942 (W. D. Tenn.) Under the reasoning of the cases just cited, the end of a suspension period does not mean that the statute then expires, but rather, when the suspension period ends, it is necessary to refer to the *status quo* before the suspension period began and then add after the end of the suspension period whatever time and allow whatever rights the Government had prior to the beginning of the period. Prior to the suspension period under the limited waiver here involved (commencing on May 21, 1936, when the 1936 waiver was filed) the Government had unlimited waiver rights under the 1933 unlimited waiver. Those rights automatically continued when the suspension period here ended in 1939, and the statute resumed its running.

Another case in point is *United States v. Fischer*, 93 F. 2d 488, 489 (C. C. A. 2d). This was an action by the United States to collect taxes due from the taxpayer. The action was barred unless a waiver given by the taxpayer in January, 1932, in connection with an offer in compromise was controlling. That waiver extended the statute by the period of time (not exceeding two years)

which had elapsed between the date of filing of the offer and the date of final action thereon. The offer was pending approximately two years. The action was within that extension period. The lower court, however, had held that first waiver not controlling on the ground that it had been superseded by two later waivers given in February, 1932, which extended the time for collection either by distraint or by a proceeding in court begun at any time before December 31, 1933. The second Circuit Court of Appeals reversed the judgment, holding that the extension effected by the first waiver was not reduced by the later waivers, since the Government relinquished no rights by accepting them. It is to be noted, in view of the taxpayer's comment (Br. 20-21), that the later waivers were not merely given but were accepted also.

By the 1936 waiver, in the instant case, the taxpayer and the Government recognized the efficacy of the unlimited waiver. In the absence of any waiver, the six year statute would have expired six years after October 19, 1929, or on October 19, 1935. The 1932 waiver had extended the statute for two months and three days, which period would carry from October 19, 1935, to December 22, 1935. This latter date would have been the expiration date if there had been no waiver subsequent to the 1932 waiver. Hence, the statute would have expired in 1935 but for the 1933 unlimited waiver. When he entered into the 1936 waiver, the taxpayer recognized the statute as "running" and not as having run or expired. The 1936 waiver provided that such "running" was to be suspended for a definite period of time. If the statute was not running when the 1936 waiver was filed, then the taxpayer who executed the waiver and the Commissioner who accepted it were acting under a mutual mis-

take, and accordingly, the 1936 waiver can be avoided on that ground, whether the mistake be deemed one of fact (*Davies v. Lahann*, 145 F. 2d 656, 660 (C. C. A. 10th); *Fidelity & Deposit Co. of Maryland v. McQuade*, 123 F. 2d 337, 339 (App. D. C.)), or one of law (*S. S. Pierce Co. v. United States*, 17 F. Supp. 667, 669 (Mass.), and cases there cited).

Regardless of whether the statute was or was not "running" when the 1936 waiver was filed, it follows from the foregoing that in either event the taxpayer's reliance upon such waiver to supersede the unlimited waiver is in vain for the reason that that waiver either operated as a mere suspension of the statute, which after the suspension resumed running, or else it accomplished nothing whatsoever.

C. The Unlimited Waiver Could Not Be Revoked or Terminated by Mere Lapse of Time, but Only Upon Reasonable Notice Given by the Taxpayer, and No Such Notice Was Given.

A waiver which is in terms unlimited as to time expires only upon reasonable notice to that effect given by the taxpayer. *Greylock Mills v. Commissioner*, 31 F. 2d 655, 658 (C. C. A. 2d); *Big Four Oil & Gas Co. v. Heiner*, 57 F. 2d 29, 30-31 (C. C. A. 3d); *Warner Sugar Refining Co. v. Commissioner*, 4 B. T. A. 5, 11-12; *Bateman v. Commissioner*, 34 B. T. A. 351, 358. No notice was given by the taxpayer with respect to the termination of the unlimited waiver here involved. [R. 72.] That the 1936 limited waiver did not constitute such notice was shown under point B above. The unlimited waiver therefore remained in effect when the tax in question was paid.

D. Even if the Unlimited Waiver Was Effective Only for a Reasonable Time, the Collection of the Tax in Question, Under the Circumstances Herein, Was Made Within a Reasonable Time.

Even if the unlimited waiver was effective only for a reasonable time, it is clear that the collection of the tax here involved was made within such time. In determining what is a reasonable time for collection, it seems obvious, that account must be taken of the taxpayer's financial condition, among other circumstances. In his letter of July 20, 1932 [Ex. A-3, R. 24-25], which was submitted with his first offer in compromise, he stated that he was unable to pay in a lump sum the balance then due, and that after making some installment payments, the last of which was made on July 8, 1932, his financial condition had grown worse, that his salary had been cut, that he owed a number of other debts, that he had to keep up a certain front in order to maintain his position, and that if it were known he was bankrupt, his "term would be short indeed." He submitted a statement of assets and liabilities, showing liabilities exceeding assets by the amount of \$32,283.35½. [Ex. A-4, R. 26-27.)

The taxpayer submitted a new offer in compromise which was dated May 6, 1936, and filed May 29, 1936. [Ex. D-1, R. 30-33.] This was an offer of \$100, in addition to \$2,216.88 referred to as already paid. He stated that he had been for several years without regular income and had been subsisting on borrowed money. His

financial statement at that time [Ex. D-4, R. 37] showed liabilities in excess of assets by the amount of \$28,698.35.

The record thus shows that by his own representation, he was in an insolvent condition in 1932 and that it continued for at least four years. Such a condition once shown to exist is presumed to continue in the absence of evidence to rebut the presumption. The presumption applies to a person's financial condition and specifically to insolvency. *Mount Vernon Hotel Co. v. Block*, 157 F. 2d 637, 639 (C. C. A. 9th); *Dunbar v. Commissioner*, 119 F. 2d 367, 370 (C. C. A. 7th); *Cleage v. Laidley*, 149 Fed. 346, 354 (C. C. A. 8th). The duration of the presumption depends of course on the circumstances. It had continued by the taxpayer's own representations for four years. In this case, a duty rested on the taxpayer to make payment as soon as he was able. Section 145 (a) of the Internal Revenue Code (26 U. S. C. 1946 ed., Sec. 145(a)), provides a heavy penalty for wilful failure to pay a tax. The taxes were admittedly justly due and owing, and so far as lapse of time is concerned, it was a penal offense for the taxpayer not to pay the taxes if he was able to do so. The taxpayer has no real ground for complaint as to delay in the absence of a showing that efforts to collect would not have been futile. He has made no such showing.

Taking all the circumstances into account, there was no unreasonable delay in the collection of the taxes in question. The District Court so found. [R. 72.]

The presumption is that taxes paid are rightly collected upon assessments correctly made by the Commissioner, and in a suit to recover them the burden rests upon the taxpayer to prove all the facts necessary to establish the illegality of the collection. *Niles Bement Pond Co. v. United States*, 281 U. S. 357, 361; *United States v. Anderson*, 269 U. S. 422; see *United States v. Rindskopf*, 105 U. S. 418. This rule as to the burden resting on the taxpayer applies where the taxpayer is asserting the expiration of the statutory period. *Tooley v. Commissioner*, 121 F. 2d 353 (C. C. A. 9th). A suit for refund of taxes is governed by equitable principles and the taxpayer must recover by virtue of a right measured by equitable standards. *United States v. Jefferson Electric Co.*, 291 U. S. 386, 402; *Stone v. White*, 301 U. S. 532, 534-535; *Ryan v. Alexander*, 118 F. 2d 744 (C. C. A. 10th).

If collection of these taxes was possible prior to October 9, 1945, the date of the Collector's final demand, the delay in payment beyond that time was at least as much due to the taxpayer's wrong as to the failure of the tax officials. It is a fundamental principle that no one can take advantage of his own wrong. This principle should particularly apply in a proceeding of an equitable nature such as the instant action.

Conclusion.

The judgment of the District Court should be affirmed.

Respectfully submitted,

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November, 1948.

